Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

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This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Proposed Rulemaking

19 CFR Part 113

Proposed Customs Regulations Amendment Relating to Carrier Liabilities for Unlawful Lading, Exportation or Disposition of Export-Controlled Merchandise

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Customs Regulations to provide for the assessment of liquidated damages under the international carrier's bond for unlawfully lading, exporting, or disposing of merchandise which is subject to the export control laws. Under the new bond provision, Customs would demand the redelivery of merchandise which has been seized or detained for violations of the export control laws. Customs would also demand the redelivery of merchandise which has been exported and is subsequently discovered or suspected to be in violation of the export control laws, but which is still in the carrier's possession on the date of the demand for redelivery. Failure to comply with these demands would result in the assessment of liquidated damages in an amount equal to three times the value of the merchandise that is not redelivered. This amendment is necessary for more effective enforcement of the export control laws.

DATE: Comments must be received on or before July 21, 1986.

ADDRESS: Comments (preferably in triplicate) may be addressed to and inspected at the Regulations Control Branch, Room 2426, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Elaine Colley, Entry Procedures and Penalties Division (202-566-8317) or William Lawlor, Carriers Drawback and Bonds Division (202-566-5856), U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C.

SUPPLEMENTARY INFORMATION:

BACKGROUND

The Export Administration Regulations contained in title 15, Code of Federal Regulations, Parts 368 through 399 (15 CFR Parts 368–399), and the International Traffic in Arms Regulations found in title 22, Code of Federal Regulations, Parts 120 through 130 (22 CFR Parts 120–130), provide for sanctions in the event that export-controlled merchandise is exported or attempted to be exported without a valid license issued by either the Department of Commerce or the Department of State. Among these sanctions are the issuance of monetary penalties against those responsible for the illegal attempted or completed exportation, seizure and forfeiture of the merchandise involved, and subsequent denial of export privileges. In addition, title 22, United States Code, § 401 (22 U.S.C. 401), provides for the seizure and detention of any vessel, vehicle or aircraft which is being used or attempted to be used or has been used in an illegal exportation of munitions of war or other export-controlled merchandise. Also, title 18, United States Code, § 549 (18 U.S.C. 549), provides for criminal penalties for unlawfully removing any merchandise from Customs custody.

Customs has been delegated the authority to enforce the Export Administration Regulations and the International Traffic in Arms Regulations pursuant to 15 CFR 386.8 and 22 CFR 127.4, respectively. Under this authority Customs may demand, pursuant to 15 CFR 386.9, the redelivery or retention of merchandise which is known or suspected to be in violation of the export control regulations.

Customs also has the authority to enforce the export control regulations by virtue of the authority granted the Secretary of the Treasury, pursuant to 22 U.S.C. 401, to seize and forfeit illegal exportations of war materials and other articles, as well as the conveyances used to export the articles. Also, under § 113 of the Export Administration Amendments Act of 1985 (P.L. 99–64), effective July 12, 1985, Customs was given additional authority to enforce the export control regulations.

Customs has been enforcing the export control laws and regulations under its Operation Exodus program. This enforcement effort has necessarily depended, to a large extent, upon the cooperation of the exporting carriers in (1) not exporting or otherwise disposing of merchandise which Customs has placed under seizure or detention pending a determination as to whether a valid export license covering the merchandise has been issued and (2) redelivering to Customs or retaining merchandise which has been exported and is subsequently found or suspected to be in violation of the export control laws. During the past two years, however, Customs has become aware that some carriers are exporting detained or seized merchandise, despite the presence of warning labels on the merchandise indicating that it is under Customs seizure or detention, and despite notification to the carrier management of the detention or seizure. There have also been instances where carriers have not

complied with Customs demand to redeliver or retain already exported merchandise subsequently found or suspected to be in violation of the export control laws, even though it is still in the carriers' possession.

Although the carriers' action may subject the conveyance to seizure and forfeiture under 22 U.S.C. 401 for its use in the illegal exportation, Customs views this as a drastic remedy which would entail much time and resources expended in effecting the seizure. Instead, it is believed that seeking liquidated damages under the international carrier's bond for exportations in violation of the export control laws, would be more expeditious, effective, and less of a drain upon Customs resources. Also, this sanction is within Customs control and can be used for every transgression, whereas a seizure action would require the U.S. Attorney to institute legal proceedings which is very time consuming.

The provisions of the international carrier's bond are contained in § 113.64, Customs Regulations (19 CFR 113.64). In § 113.64, however, there is no existing provision setting forth liquidated damages for illegal exportations of export-controlled merchandise. Customs has the authority to enact such a provision by virtue of § 623(a), Tariff Act of 1930, as amended (19 U.S.C. 1623(a)), which provides that "In any case in which bond or other security is not specifically required by law, the Secretary of the Treasury may by regulation or specific instruction require, or authorize customs officers to require, such bonds or other security as he, or they, may deem necessary for the protection of the revenue or to assure compliance with any provision of law, regulation, or instruction which the Secretary of the Treasury or the Customs Service may be authorized to enforce." Pursuant to 15 CFR 386.8 and 22 CFR 127.4, Customs is authorized to enforce the export control laws and regulations. Under the authority of 19 U.S.C. 1623(a), Customs may therefore require a bond to assure compliance with these laws and regulations.

PROPOSAL

Accordingly, Customs proposes to amend Part 113, Customs Regulations (19 CFR Part 113), to include a provision in the international carrier's bond that sets forth liquidated damages for illegal exportations under the export control laws. It is proposed to add a new paragraph (e) to § 113.64 (19 CFR 113.64), that would require the carrier to redeliver to Customs, within 30 days after a demand for redelivery: (1) illegally disposed of, laded or exported merchandise that has been placed under seizure or detention; and/or (2) merchandise which has been exported and is subsequently found or suspected to be in violation of the export control laws, but which is still in the carrier's possession. The demand for redelivery would be made within 20 days of Customs discovery of the unlawful or suspected unlawful disposition or exportation. Any demand under proposed paragraph (e) would specify the terms and conditions of

compliance. If the carrier fails to comply with the redelivery notice, it would be liable for liquidated damages in an amount equal to three times the value of the merchandise that is not redelivered.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Room 2426, Customs Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that, if adopted, the proposed amendment will not have a significant economic impact on a substantial number of small entities. Accordingly, the amendment is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in § 1(b) of E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

DRAFTING INFORMATION

The principal author of this document was Susan Terranova, Regulations Control Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 113

Carriers, exports, bonds.

PROPOSED AMENDMENT

It is proposed to amend Part 113, Customs Regulations (19 CFR Part 113), as set forth below.

PART 113—CUSTOMS BONDS

1. The authority citation for Part 113 would continue to read as follows:

AUTHORITY: 19 U.S.C. 66, 1623, 1624, Subpart E also issued under 19 U.S.C. 1484.

2. It is proposed to amend § 113.64 by adding a new paragraph (e), to read as follows:

§ 113.64 International Carrier Bond Conditions.

* * * * * * *

(e) *Unlawful disposition, lading or exportation.* (1) Principal agrees that it will not allow seized or detained merchandise, marked with warning labels of the fact of seizure or detention, to be placed on board a vessel, vehicle or aircraft for exportation or to be otherwise disposed of without written permission from Customs, and that if it fails to prevent such placement or other disposition, it will redeliver the merchandise to Customs within 30 days, upon demand made within 20 days of Customs discovery of the unlawful placement or other disposition.

(2) Principal agrees that it will act, in regard to merchandise in its possession on the date the redelivery demand is issued, in accordance with any Customs demand for redelivery made within 20 days of Customs discovery that the merchandise was or may have been exported in violation of the export control laws.

(3) Obligors agree that if the principal defaults in either of these obligations, they will pay, as liquidated damages, an amount equal to three times the value of the merchandise which was not redelivered.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: May 8, 1986.
FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, May 22, 1986 (51 FR 18801)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

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Decisions of the United States Court of International Trade

(Slip Op. 86–47)

BONANZA TRUCKING CORP., PLAINTIFF *v.* UNITED STATES OF AMERICA ET AL., DEFENDANTS

Court No. 86–03–00350

MEMORANDUM

[Plantiff's application for injunction granted; defendants' motion for judgment on agency record denied.]

(Decided May 1, 1986)

Soller, Singer & Horn (Carl R. Soller, Margaret H. Sachter and *William C. Shayne)* for the plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch *(Paula N. Rubin)* for the defendants.

AQUILINO, *Judge:* The plaintiff New York corporation seeks to set aside and enjoin a decision of the defendant Commissioner of Customs to revoke its licenses to cart bonded merchandise and to operate a container station. In addition to opposing the equitable relief requested by the plaintiff, the defendants have interposed a motion for judgment on the administrative record pursuant to the CIT Rule 56.1.

BACKGROUND

Bonanza Trucking Corporation's licenses[1] were issued by the Customs Service on May 29, 1969 and on August 2, 1976, respectively. The applications for both licenses had been submitted by the company's president, Angelo Ferrugia.

In or about May 1984, a multi-count indictment was returned in the United States District Court for the Eastern District of New York, charging Mr. Ferrugia with obstruction of justice, perjury and tax evasion. As of August 30, 1984, Mr. Ferrugia resigned as an officer of Bonanza, and he transferred all of his stock to his

[1] *See* administrative record document ("RD") F–2.

brother Salvatore. The company's counsel notified the Customs Service of this resignation and transfer of ownership in a letter dated September 12, 1984 and which transmitted copies of the corporate documents. *See* RD F–3. Thereafter, a jury found Mr. Ferrugia guilty of one violation of 18 U.S.C. § 1503 and of one violation of 18 U.S.C. § 1623(a). On November 8, 1984, judgment of conviction was entered, imposing fines of $5,000 and five years' probation on each count. *See* RD F–4.

After having apparently conducted an internal investigation of the facts and circumstances of the criminal proceeding, Customs, over the signature of its Area Director, JFK Airport Area, issued a letter to Bonanza stamped May 8, 1985 and stating:

> * * * Pursuant to § 112.30 of the Customs Regulations (19 C.F.R. 112.30), the District (Area) Director of Customs may revoke or suspend the license of a cartman if the holder of such a license or an officer of a corporation holding such a license is convicted of a felony (19 C.F.R. 112.30(a)(5)).
>
> Accordingly, I propose to revoke your license for the following reason:
>
> CHARGE: Violation of § 112.30(a)(5) of the Customs Regulations which provide in pertinent part for revocation if an officer of a corporation holding a cartman's license is convicted of a felony.
>
> SPECIFICATION: On May 2, 1984, Angelo Ferrugia, the President and sole owner of Bonanza Trucking Corp., was indicted by a Federal Grand Jury on 25 counts covering perjury, obstruction of justice and tax evasion. On September 20, 1984 Angelo Ferrugia was found guilty of perjury, in violation of 18 U.S.C. 1023(a) [*sic*] and obstruction of justice in violation of 18 U.S.C. 1503. Although we received the letter of resignation of Angelo Ferrugia dated August 30, 1984, Mr. Ferrugia has continued to act as a de facto officer of Bonanza Trucking Corp. after his resignation * * *. RD B.

A second, similar letter was sent the same day, revoking Bonanza's license to operate the container station. *See* RD A. Both letters informed the company of its right to appeal.

In a letter dated May 14, 1985 [RD C], Bonanza requested a hearing pursuant to 19 C.F.R. §19.48(b) on the revocation of its container-station license. A second letter dated May 14th [RD D] requested a hearing pursuant to 19 C.F.R. §112.30 on the revocation of the license to cart. Both letters called for production of any documents supporting the allegations made in the May 8 notices of revocation.

The requests for a hearing were granted, but Customs refused to produce any documents prior thereto on the ground that

> there is no requirement that the government produce evidence to support its case against the license holder. In addition, it would not be in the interest of justice for the government to voluntarily submit evidence to the license holder and not have

the opportunity to make a similar request of the license holder. RD E.

The Customs District Director, St. Louis, Missouri, was appointed hearing officer, and the parties appeared before him on June 20, 1985.

At the hearing, the Service's Assistant Regional Counsel called two witnesses, namely, Anthony M. Liberta, who, as JFK Area Director, has revoked Bonanza's licenses, and the probation officer responsible for post-sentence supervision of Angelo Ferrugia. Nine exhibits were also presented by the Service, to wit, The Journal of Commerce's *1985 Transportation Telephone Tickler* listing of Bonanza Trucking Corp. and correspondence with the company's office manager on that listing [RD F-1]; the licenses; the September 12, 1984 letter and enclosed corporate documents; the judgment of conviction; excerpts from the transcript of the trial of Mr. Ferrugia in the distict court [RD's F-5, F-6, F-7]; and the transcript of the imposition of his sentence [RD F-8].

Bonanza's counsel at the hearing (and now before this court) was not Angelo Ferrugia's lawyer during his lengthy trial. At the hearing on June 20th, counsel, who apparently was unfamiliar with the trial transcript and who has not been afforded an opportunity to review the selected excerpts beforehand, objected to their introduction into evidence (on the ground of non-relevance). *See, e.g.,* RD F, pp. 30–31. The objection was overruled,[2] as was a similar objection to reliance on the sentencing transcript. *See id.* at 33. On cross-examination, Mr. Liberta indicated that, prior to this issuance of the license revocations, he had received and reviewed a report of the Customs internal investigation. *See id.* at 35, 45. When Bonanza's counsel requested that this document be produced, he was overruled,[3] as was his request that the witness be directed to at least name the author of the report. *See id.* at 41. At the end of the attempted cross-examination, the hearing officer rejected counsel's effort to reserve the right to recall Mr. Liberta in view of the inability to prepare any defense in advance. *See id.* at 55–56.

The probation officer's testimony was based on notes he took in connection with periodic visits with Angelo Ferrugia. Bonanza's counsel requested an opportunity to review the notes in conjunction with his cross-examination; the request was denied. *See id.* at 66–67. Finally, at the close of the Customs presentation, the company's counsel asked that the hearing be adjourned to enable him to prepare a defense. That request was also denied. *See id.* at 75–76.

On November 19, 1985, the hearing officer forwarded his report to the Commissioner of Customs on the proceeding on June 20th, recommending affirmance of the license revocations essentially for the following reasons:

[2] *See* RD F, pp. 31–32.
[3] *See id.* at 36–37.

1. Angelo Ferrugia was convicted of the felonies of perjury * * * and obstruction of justice * * * on September 20, 1984.

2. Although documents were submitted to Customs on September 14, 1984, which stated Angelo Ferrugia resigned as president and director of the corporation (dated August 30, 1984) and transferred his stock ownership in the corporation (dated August 28, 1984) more substantial evidence shows that Angelo Ferrugia continues to run and own Bonanza Tucking Corporation. The evidence includes Angelo Ferrugia's sworn testimony in the public record as of September 10, 1984, that he runs and owns Bonanza Trucking. The claimed new president and owner as cited in the documents of August 30, 1984, testified on September 11, 1984, that he works for Angelo and is not involved in running the company.

3. Since Angelo Ferrugia is a de facto officer of the corporation running the container station and the cartmen's operation, it is fair and appropriate that he and the company be held to the full impact of the requirements and regulations. RD H, p. 11.

* * * * * * *

7. Bonanza Trucking Corporation, through their attorney, chose not to present any evidence or witnesses to refute the charges even through they asked for a hearing and were present for a hearing. Bonanza Trucking Corporation's attorney's claim that Customs cannot revoke Bonanza's license and privilege to operate because Angelo Ferrugia signed a letter of resignation as president prior to the time of conviction is not valid. RD H, p. 12.

In a letter dated March 7, 1986 to the JFK Area Director, the Commissioner stated his decision to revoke Bonanza's licenses "based on the recommendation of the hearing officer * * * and the evidence presented at the hearing". RD J.

Upon receipt of the decision, plaintiff commenced this case, obtaining a temporary restraining order[4] upon order to show cause. The complaint pleads five causes of action under the Administrative Procedure Act on allegations essentially that (1) Angelo Ferrugia was not an officer of Bonanza at the time of his conviction, (2) the Customs Service did not prove that he was an officer, (3) the revocation of the container-station license was a denial of due process, (4) the Commissioner of Customs should have disqualified himself, and (5) Bonanza was not given an opportunity to comply with the Service's regulations before revocation.

On April 14, 1986, counsel for both sides presented oral argument in open court in support of their respective positions. The defendants concede jurisdiction of this court under 28 U.S.C. § 1581(i).[5]

[4] This order of March 18, 1986 has continued in effect on consent of the defendants.

[5] *Compare* plaintiff's Verified Complaint, para. 1 *with* defendants' Answer, para. 1.

DISCUSSION

As indicated above, pages 3–4, the hearing on June 20, 1985 was requested and held pursuant to Sections 19.48 and 112.30 of Title 19, C.F.R.,[6] both of which provide for the right of cross-examination. For example, subsection (d)(2) of 19 C.F.R. §112.30 states:

> *Conduct of hearing.* The holder of the license may be represented by counsel at the revocation or suspension hearing. All evidence and testimony of witnesses in such proceeding, including substantiation of charges and the answer thereto, shall be presented with both parties having the right of cross-examination * * *.[7]

At the June 20 hearing, the JFK Area Director conceded that revocation of Bonanza's license to cart was a "very serious" matter. RD F, p. 53. In *Bell* v. *Burson*, 402 U.S. 535 (1971), the Supreme Court stated:

> * * * Once licenses are issued * * * their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licenses. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment.[8]

Federal agency action in the form of revocation of a security clearance was under review in *Greene* v. *McElroy*, 360 U.S. 474 (1959), wherein the Court reminded the government:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of * * * testimony * * *. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right "to be confronted with the witnesses against him." *This Court has been zealous to protect these rights from erosion.* It has spoken out not only in criminal cases but also *in all types of cases where administrative and regulatory actions were under scrutiny.*[9]

The Supreme Court has also held that it is "equally fundamental that the right to notice and an opportunity to be heard 'must be

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[6] *See* RD H (transmittal letter from hearing officer to Commissioner of Customs (Nov. 19, 1985)).

[7] *See also* 19 C.F.R. 19.48(C).

[8] 402 U.S. at 539, citing *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970).

[9] 360 U.S. at 496–97 (footnote and citations omitted; emphasis added).

granted at a meaningful time and in a meaningful manner'." *Fuentes* v. *Shevin*, 407 U.S. 67, 80 (1972), quoting from *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965).

This Court of International Trade has stayed the revocation of a Customs license where the holder thereof has been denied a meaningful opportunity to be heard. *See, e.g., Barnhart* v. *United States Treasury Department*, 7 CIT 300, 588 F. Supp. 1432 (1984). The record in this case clearly reflects the denial of such an opportunity, commencing with the assertion of Customs before the hearing, *supra* page 4, that the Service was not required to produce any evidence in support of its case for revocation. When the Service then sought to adduce proof at the hearing, its main witness identified the report of the internal investigation as the key to the evidence he relied on in reaching his decision to revoke, namely, the excerpts from the criminal trial transcript and the subsequent sentencing transcript. In the face of this testimony, the Customs counsel nevertheless vigorously opposed producing a copy of the report, or even the name of its author, to the other side,[10] and the hearing officer sustained the objection. When the Service's other witness indicated he could not testify other than by referring to his notes, they were not ordered produced. When Bonanza's attorney sought an adjournment to prepare a rebuttal to the Service's evidence, the hearing officer denied the application without stating any reason for his ruling. *See* RD F at 76.

Of course, procedural irregularities in administrative proceedings must be prejudicial to a party in order to justify judicial intervention. *E.g., United States* v. *Priority Products, Inc.*, 9 CIT —, Slip Op. 85–81, at 5 (Aug. 5, 1985), citing *Melamine Chemicals, Inc.* v. *United States*, 8 CIT 105, 592 F. Supp. 1338 (1984); *American Motorists Insurance Co.* v. *United States*, 5 CIT 33 (1983); *John V. Carr & Son, Inc.* v. *United States*, 69 Cust. Ct. 78, C.D. 4377, 347 F. Supp. 1390 (1972), *aff'd*, 61 CCPA 52, 496 F.2d 1225 (1974).

This court concludes that it was clearly prejudicial in this case for Customs to withhold from opposing counsel its report of the facts and circumstances of Bonanza's operations, especially since the record indicates that that report prompted the license revocations. In fact, on this point, the government's situation is similar to its situation in *Greene* v. *McElroy, supra*, where it was obvious that confidential reports has been relied on in revoking the security clearance and yet they were never made available to the holder of the clearance during the administrative process. *See* 260 U.S. at 479. The Court in *Greene* reversed the revocation, and the same remedy is mandated here. *Cf. Barnhart* v. *United States Treasury Department, supra.*

Furthermore, this is yet another case which proves the importance of meaningful cross-examination. Angelo Ferrugia's trial in

[10] *See* RD F at 35–41.

1984 for perjury was based on testimony he gave to a grand jury in 1981. Understandably, this testimony was read to the petit jury by the prosecution. At the subsequent administrative hearing, some of the 1981 testimony contained in the September 1984 transcript [11] was presented by counsel for Customs without warning to opposing counsel or the hearing officer of the time discrepancy. *See* RD F at 25–32. Indeed, the Service's attorney attempted to create the impression that 1981 was 1984 as follows:

> This [RD F–5] * * * contains statements after Mr. Angelo Ferrugia had resigned on the 30th and it has statements * * * in the transcript as to Angelo—in Angelo Ferrugia's own words himself, what his role was or what his role is running the business of Bonanza Trucking Corporation * * *. RD F at 28.

This attempt was successful.

While the record before this court does not show Angelo Ferrugia testified at his trial in 1984, the report sent to the Commissioner of Customs and quoted above, page 6, clearly shows that the hearing examiner believed that he had testified, to wit:

> * * * The evidence includes Angelo Ferrugia's sworn testimony in the public record as of September 10, 1984, that he runs and owns Bonanza Trucking.[12] * * *

Moreover, the subsequent decision of the Commissioner relied on this erroneous, if not tainted, finding, which, of course, is central to the issue of whether the Bonanza licenses are subject to revocation pursuant to 19 C.F.R. § 19.48(a)(3) and § 112.30(a)(5),[13] respectively. In any event, neither Bonanza's counsel nor the hearing officer appears to have recognized the fundamental discrepancy, either during the hearing [14] or thereafter. Indeed, at first, defendants' counsel herein sought to rely on the same erroneous implication that Angelo Ferrugia had actually testified in September 1984.[15] This "oversight" was corrected in their reply brief,[16] wherein the defendants now argue that Bonanza's counsel had "actual notice of the nature of these portions of the transcript," [17] that on summation he was silent as to them and their probative value and that this silence resulted in a waiver of any right to argue that the hearing officer misunderstood their nature.

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[11] *See* RD F–5 at 239, 298, 308–10, 315 (Sept. 10, 1984); RD F–6 at 362, 374 (Sept. 11, 1984).

[12] RD H, p. 11. *See id.* at 9 ("Angelo Ferrugia testified he is the full owner of Bonanza Trucking and he has no partners") and 10 ("the sworn testimony of Angelo at the trial invalidates belief that he is not president in fact"; "Angelo's own trial testimony shows he has no intent of stopping running the company").

[13] Both regulations permit revocation if an officer of a corporation holding the license is convicted of a felony.

[14] During her closing argument on June 20, 1985, the Customs counsel made a passing reference to Angelo Ferrugia's grand jury testimony which was read into the record [*see* RD F at 78], though that reference skipped over critical page 289 of the trial transcript.

[15] *See* Memorandum in Opposition to Plaintiff's Motion for a Preliminary Injunction and in Support of Defendant's Motion for Judgment on the Administrative Record, p. 15.

[16] Defendant's Opposition to Plaintiff's Motion for Judgment on the Agency Record and Reply to Plaintiff's Response to Defendants' Cross-Motion for Judgment on the Agency Record and Plaintiff's Motion for a Preliminary Injunction, p. 8.

[17] *Id.* at 9.

The record before this court does not support this thesis. Rather, as indicated above, the record shows that plaintiff's counsel was not Angelo Ferrugia's lawyer, that he was not otherwise familiar with the transcript of the trial, that the Customs counsel refused to provide him with the selected excerpts in advance of the hearing, that he objected to their introduction at the hearing,[18] which was overruled, and that he was not permitted to prepare a case in rebuttal. Finally, the hearing officer did indeed misunderstand their nature.

The defendants are correct in their contention that this court's review of their record is pursuant to 28 U.S.C. § 2640(d), which is tied to the Administrative Procedure Act, 5 U.S.C. § 706. However, that statute requires the court to set aside agency action which is found to be without observance of procedure required by law.

As shown above, the procedure required by law in the administrative process under review herein was meaningful cross-examination, which the court finds was denied plaintiff Bonanza Trucking Corporation. Since the agency action must therefore be set aside, defendants' motion for judgment on the agency record must be denied. The court need not and does not reach other issues raised by the parties.

Judgment will enter accordingly.

(Slip Op. 86-48)

LEATHER'S BEST, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 84-4-00504-S

OPINION

[Defendant's motion for partial summary judgment denied.]

(Decided May 1, 1986)

Mandel & Grunfeld (Steven P. Florsheim) for plaintiff.

Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, and *Barbara M. Epstein,* Civil Division, United States Department of Justice, for defendant.

RESTANI, *Judge:* Plaintiff Leather's Best challenges the determination of the United States Customs Service (Customs) that merchandise imported by plaintiff in 1982 should be classified under item 121.61 of the Tariff Schedules of the United States (TSUS), as other finished leather, not fancy. Plaintiff claims the merchandise is properly classified under TSUS item 121.65, as other finished leather, fancy. As such, plaintiff claims the merchandise is entitled to duty-free treatment for purposes of the Generalized System of Preferences (GSP). 19 U.S.C. §§ 2461-2465 (1982); TSUS General

[18] Certainly, his acceptance of opposing counsel's representation as to page numbers [*see* RD F at 25] is of no moment, especially in view of EC 7-14 of the Lawyer's Code of Professional Responsibility to the effect that a government lawyer in an administrative proceeding has the responsibility to develop a full and fair record.

Headnote 3(c). Currently before the court is defendant's motion for partial summary judgment, in which defendant seeks dismissal of plaintiff's claim under the GSP. CIT Rule 56. Defendant contends that plaintiff has failed to fulfill one of the conditions precedent to obtaining GSP treatment, and that, as a result, the court should dismiss the claim.

Customs will only consider a claim for an exemption from duty on the ground that the GSP applies if six conditions, specified in the regulations, are met. 19 C.F.R. § 10.172 (1982). One of these requirements is evidence of the country of origin, or the waiver of Customs thereof. *Id.* § 10.173. In a case involving merchandise valued in excess of $250, the importer or consignee of the shipment is generally required to file a Certification of Origin Form A (Form A) at the time of entry.[1] *Id.* § 10.173(a)(1). The Form A "shall be signed by the exporter of the merchandise in the country from which it is directly imported, certified by the designated governmental authority in that country, and properly completed." *Id.* Alternatively, Customs may waive the Form A requirement under certain circumstances. *Id.* § 10.173(a)(5). In its motion to amend its answer, however, defendant states that it "has determined that it is unwilling to waive the submission by plaintiff of the certificates of origin * * *." Motion to Amend Answer at 1 (Mar. 13, 1986).[2] Plaintiff was informed of this decision on February 10, 1986. Absent this waiver, plaintiff is required to produce a Form A as a prerequisite to GSP duty-free treatment. 19 C.F.R. § 10.172. *See also Audiovox Corp.* v. *United States,* 8 CIT 233 598 F. Supp. 387, 389 (1984) (filing of Form A as a "condition precedent" to GSP treatment), *aff'd,* 764 F.2d 848 (Fed. Cir. 1985); *Harwood Manufacturing Co.* v. *United States,* 7 CIT 288, Slip Op. 84-57 at 8 (May 30, 1984) (same), *modified,* 8 CIT 173, Slip Op. 84-104 at 3 (Sept. 19, 1984) (same); *House of Ideas, Inc.* v. *United States,* 2 CIT 68, 72 (1981) (same).

It is uncontested that in this case no Forms A have been submitted. Collective Exhibit A. As defendant has noted, generally a Form A must be filed "in connection with the entry." 19 C.F.R. § 10.173(a)(1). Defendant, however, overstates the consequences of a failure to file in a timely manner when it further claims that plaintiff's failure to file Forms A as of this point in the proceedings prohibits it from raising the GSP claim. Both parties cite the regulation regarding late filing of free entry documents. 19 C.F.R. § 10.112 (1982). This provision allows a party to file a Form A "before * * * liquidation becomes final," provided that "failure to file it was not due to willful negligence or fraudulent intent." *Id.*

[1] The parties are apparently in accord that the subject merchandise is valued in excess of $250.

[2] The court notes that the decision of Customs to waive the production of a Form A should be positive when the appropriate district director "is otherwise satisfied that the merchandise qualifies for duty-free entry under the Generalized System of Preferences." 19 C.F.R. § 10.173(a)(5). The court interprets Customs' use of the word "unwilling" as an inability on the part of the district director to be so satisfied, rather than as a refusal to be so satisfied. The latter would be contrary to the spirit and letter of the regulatory scheme.

Plaintiff correctly notes in its response that inasmuch as the liquidation in this case will not become final until after the court renders its judgment, plaintiff is not foreclosed from attempting to submit the forms until that time. In the past, this court has allowed submission of Forms A as late as the time of trial. *Harwood Manufacturing, supra.* Plaintiff's ability to submit the forms at such a late date will, of course, be limited by its ability to demonstrate that the failure to file them previously was not due to willful negligence or fraudulent intent. *Harwood Manufacturing,* 8 CIT at 174, Slip Op. 84–104 at 4; *see Mattel, Inc.* v. *United States,* 67 CCPA 74, 76 624 F.2d 1076, 1078 (1980); *Green Giant Co.* v. *United States,* 79 Cust. Ct. 61, 70, C.D. 4715 (1977). Plaintiff contends that it is currently attempting to acquire the Forms A from Argentina, the country of origin, and has submitted an affidavit and exhibits to support this claim.

The court concurs with plaintiff's position that defendant's motion to dismiss the GSP claim for failure to submit the requisite Forms A is premature at this stage in the proceedings. Under 19 C.F.R. § 10.112, plaintiff may file the Forms A at any time before the liquidations are final unless it has acted in an inexcusably dilatory manner. Furthermore, plaintiff's supporting affidavit indicates that whether the failure to file at the time of entry was due to willful negligence or fraudulent intent is an unresolved question of fact.[3] As such, it cannot be decided against plaintiff in a motion for summary judgment. So ordered.

(Slip Op. 86–49)

NEC AMERICA, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 83–6–00799S

Before RE, *Chief Judge.*

MEMORANDUM OPINION AND ORDER

[Defendant's motion to compel discovery granted in part and denied in part.]

(Dated May 2, 1986)

Glad & Ferguson (*Edward N. Glad,* on the motion), for plaintiff.
Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office (*Saul Davis,* on the motion), for defendant.

RE, *Chief Judge:* The question presented in this case pertains to the proper classification, for customs duty purposes, of certain merchandise imported from Japan, and described on the Customs invoice as "paging receivers."

The merchandise was classified by the Customs Service as "other solid-state (tubeless) radio receivers" under item 685.24 of the

[3] *Inter alia,* plaintiff alleges that it relied on Customs' waiver of the Form A requirement in similar situations.

Tariff Schedules of the United States (TSUS). Consequently, the merchandise was assessed with duty at a rate of 8.8 per centum ad valorem.

Plaintiff protests this classification and contends that the merchandise is properly classifiable under item 685.70, TSUS, as "indicator panels or other sound or visual signalling apparatus," dutiable at a rate of 3.5 per centum ad valorem.

Pursuant to Rule 37 of the Rules of this Court, defendant has moved for an order compelling discovery. Specifically, defendant requests that plaintiff be ordered to provide responses to defendant's interrogatories, and to produce certain documents. Defendant also requests that it be permitted to depose plaintiff's expert witnesses.

Plaintiff opposes defendant's motion. Plaintiff contends that it has "satisfactorily and adequately" answered defendant's interrogatories. In addition, plaintiff states that the documents which defendant has requested need not be produced because none of the requested documents are under plaintiff's control. Finally, plaintiff opposes the deposition of its three expert witnesses because "to permit defendant to depose plaintiff's witnesses would unduly delay the trial of this case and would place undue expenses on plaintiff."

At the outset, it is helpful to note that the imported merchandise in this case is identical in every respect to the merchandise at issue in *NEC America, Inc.* v. *United States,* 8 CIT 184, 596 F. Supp. 466 (1984), *aff'd,* 760 F.2d 1295 (Fed. Cir. 1985). Hence, both parties have the benefit of a prior judicial decision which deals with identical merchandise, and the same provisions of the TSUS.

In *NEC America, Inc.* v. *United States,* this court considered the issues presented in this case, and held that the presumption of correctness that attaches to the government's classification had not been overcome. Hence, the paging receivers were held to be properly classified as "other solidstate (tubeless) radio receivers," under item 685.24, TSUS. *See* 596 F. Supp. at 472. Upon appeal to the United States Court of Appeals for the Federal Circuit, the appellate court affirmed on the basis of this court's decision. 760 F.2d 1295 (Fed. Cir. 1985).

In its memorandum in opposition to defendant's motion, plaintiff states that the present action "is a retrial brought on by plaintiff ony because plaintiff feels that the trial court erred in the first [NEC] case * * *." It is well-established that, in customs classification cases, "a determination of fact or law with respect to one importation is not *res judicata* as to another importation of the same merchandise by the same parties." *Schott Optical Glass, Inc.* v. *United States,* 750 F.2d 62, 64 (Fed. Cir.), *rev'g,* 587 F. Supp. 69 (Ct. Int'l Trade 1984); *see United States* v. *Stone & Downer Co.,* 274 U.S. 225 (1927).

Defendant contends that plaintiff has failed to answer adequately a number of questions contained in defendant's interrogatories.

Rule 33 of the Rules of this Court governs the availability and scope of written interrogatories. Rule 33 requires that

> [e]ach interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objections shall be stated in lieu of answer.

Rule 37 allows a party, upon reasonable notice to the other parties, to apply for an order compelling discovery if a party fails to answer an interrogatory submitted under Rule 33. For the purposes of a Rule 37 motion, "an evasive or incomplete answer is to be treated as a failure to answer." U.S.C.I.T.R. 37(a)(2).

It is well established that "interrogatories shall be answered directly and without evasion." 8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2177, at 559 (1970 & Supp. 1985). An answer to an interrogatory must be responsive and complete in itself, and should not refer to the pleadings, depositions, documents, or other interrogatories. *See, e.g., International Mining Co.* v. *Allen & Co.*, 567 F. Supp. 777, 787 (S.D.N.Y. 1983); *J.J. Delaney Carpet Co.* v. *Forrest Mills, Inc.*, 34 F.R.D. 152, 153 (S.D.N.Y. 1963); 4A J. Moore, *Moore's Federal Practice* ¶ 33.25 [1] (1983).

Defendant has identified several questions which it claims that plaintiff has failed to answer. Ultimately, of course, the Court decides whether plaintiff has satisfactorily and adequately answered an interrogatory. *See Martin* v. *Easton Publishing Co.*, 85 F.R.D. 312, 316 (E.D. Pa. 1980).

An examination of the answers that plaintiff has provided shows that, in almost every instance, plaintiff answered by referring defendant either to the testimony or the exhibits of the first *NEC America* case. Defendant objects to several answers which merely give a general reference to the prior testimony of plaintiff's witness, Michael J. McLaughlin. Defendant states that, although it has reviewed the record, it was nonetheless "unable to ascertain the precise factual basis [for plaintiff's answers]." Since the answers which refer solely to prior testimony are unresponsive, they must, for the purposes of a Rule 37 motion, be treated as a failure to answer. Hence, the Court properly may order plaintiff to provide answers that specifically state or quote the portion of the record upon which plaintiff relies for its answers.

Defendant has also asked plaintiff to provide information pertaining to the identity and expected testimony of plaintiff's expert witnesses. This information is governed by Rule 26(b)(4), which provides that:

> (A)(*i*) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

U.S.C.I.T. R. 26(b)(4)(A)(*i*).

Plaintiff has identified three witnesses whom it expects to call at trial. It has also given the subject matter on which each expert is expected to testify, and the opinions of these experts. In essence, the witnesses will testify that, to fall within the common meaning of a solid-state (tubeless) radio receiver, the imported product must have a tuner and an audio amplifier.

Plaintiff, however, has not provided a summary of the grounds for each opinion. Accordingly, as required by the Rules of this Court, plaintiff is directed to give an appropriate summary of the grounds for each witness's opinion.

In defendant's second set of interrogatories, plaintiff was asked to provide information pertaining to the background of its experts. This information may be useful in cross-examination, and is discoverable under Rule 26, since it is considered relevant to the expert's qualifications and identity. *See e.g., Clark* v. *General Motors Corp.*, 20 F.R. Serv. 2d 679, 683–84 (D. Mass. 1975); *United States* v. *IBM Corp.*, 66 F.R.D. 215, 218–19 (S.D.N.Y. 1974). Plaintiff objects to this request, and asserts that the information is "a matter of public record." However, the fact that the requested information may be in the public domain does not automatically render the interrogatories objectionable. *See Rogers* v. *Tri-State Materials Corp.*, 51 F.R.D. 234, 245 (N.D. W. Va. 1970). It is likely that plaintiff has a current *curriculum vitae* and list of published writings for each of its witnesses, or can easily obtain them. Surely, then, it is a minimal burden for plaintiff to provide the requested information. Accordingly, plaintiff is directed to provide defendant with the complete professional background of its expert witnesses, as well as a list of all publications that they have authored or co-authored which pertain to pagers or radio receivers.

Defendant also contends that it should be permitted, under Rule 26(b)(4)(A)(*ii*), to depose plaintiff's expert witnesses regarding opinions held and facts known and obtained in anticipation of litigation. That Rule permits the court, upon motion, after interrogatories have been served pursuant to Rule 26(b)(4)(A)(*i*), to order "further discovery by other means." U.S.C.I.T. R. 26(b)(4)(A)(*ii*).

Plaintiff has identified three witnesses that it will call at trial: Michael J. McLaughlin, Arthur F. Peters, and Rudolf F. Graf. Mr. McLaughlin, who testified at the first trial, is an employee or plaintiff and, therefore, is not subject to the protection of Rule 26(b)(4)(A). *See, e.g., Kansas-Nebraska Natural Gas Co.* v. *Marathon Oil Co.*, 109 F.R.D. 12, 15 (D. Neb. 1985); *Virginia Electric & Power Co.* v. *Sun Shipbuilding & Drydock Co.*, 68 F.R.D. 397, 406 (E.D. Va. 1975).

Rule 26 permits the court, upon motion, to order further discovery of experts to be called at trial, as the court may deem appropriate. Hence, it is within the sound discretion of the Court to allow defendant to depose plaintiff's experts. *See, e.g., Herbst* v. *ITT*

Corp., 65 F.R.D. 528, 530–31 (D. Conn. 1975); *United States* v. *John R.-Piquette Corp.*, 52 F.R.D. 370, 371–72 (E.D. Mich. 1971). Plaintiff's chief objection to allowing the deposition of either Mr. Peters or Mr. Graf, is that "defendant is not willing to pay the full expert witness fee." The Rules of this Court, however, provide that unless manifest injustice will result, "the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery * * *." U.S.C.I.T. R. 26(b)(4)(C). Defendant, in its proposed order, has indicated that it will pay the experts the equivalent of the fee that plaintiff has agreed to pay them. Hence, plaintiff has not shown a persuasive or appropriate reason why defendant's motion should not be granted. Accordingly, the Court orders that defendant shall be permitted to depose plaintiff's experts and shall be required to pay the experts a reasonable fee for time spent responding to discovery.

Finally, defendant requests plaintiff to identify each present or former employee of plaintiff who was involved or participated in the preparation of papers or testimony given by plaintiff's parent corporation, Nippon Electric Co., Ltd., during the International Trade Commission's investigation of "High Capacity Pagers from Japan." The defendant's purpose for this request is to ascertain whether statements made before the agency are admissible under Rule 801(d) of the Federal Rules of Evidence, as admissions of a party. *See United States* v. *McKeon*, 738 F.2d 26, 31–33 (2d Cir. 1984). Plaintiff responded that the information was in the public record. Although this may be true with respect to the identity of persons who gave testimony, it is not true as to persons who were involved with the preparation of the papers submitted to the agency. The Court, therefore, orders plaintiff to provide the requested information.

The Court has considered defendant's remaining requests, and finds them either without merit or satisfied by plaintiff's memorandum. Therefore, upon reading and filing defendant's motion to compel responses to defendant's interrogatories, defendant's request for production of documents, and for depositions of plaintiff's experts; plaintiff's memorandum in opposition to defendant's motion; upon all other papers; and after due deliberation, it is hereby

ORDERED that, within 30 days of the date of entry of this Order, plaintiff shall supplement its responses to defendant's interrogatories as follows:

1. Plaintiff shall specify the reasons for plaintiff's contention that the pagers respond only to a digital signal;

2. Plaintiff shall detail with specificity the function of each component of the imported merchandise;

3. Plaintiff shall provide a summary of the grounds of each opinion of the expert witnesses that plaintiff intends to call at trial;

4. Plaintiff shall provide the complete professional background of its expert witnesses, and shall provide a list of any published writings that they have authored or co-authored which pertain to pagers, radio receivers, or other devices that perform the functions of selectivity, detection, and amplification of radio waves;

5. Plaintiff shall identify each present or former employee of plaintiff who was involved in the preparation of papers filed, submissions made, and testimony given by Nippon Electric Co., Ltd. (NEC), during the International Trade Commission's investigation of "High Capacity Pagers From Japan," Investigation No. 731-TA-102; it is further

ORDERED that defendant shall be permitted to depose plaintiff's witnesses in all matters relevant to this case, in accordance with Rule 30 of the Rules of this Court; it is further

ORDERED that plaintiff shall provide defendant within 30 days of the date of this Order with a copy of its fee arrangements with Mr. Peters and Mr. Graf; and it is further

ORDERED that, upon receipt of appropriate bills from Mr. Peters and Mr. Graf, after their depositions, defendant's counsel expeditiously shall process those bills with the United States Department of Justice, Washington, D.C., for payment to the named deponents. So ordered.

(Slip Op. 86-50)

PLS INTERNATIONAL, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 85-2-00189

Before DICARLO, *Judge.*

[Defendant's motion is denied.]

(Decided May 2, 1986)

Vecchio & Schulz Co., L.P.A. (*William J. Schulz*) for plaintiff.

Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Civil Division, Department of Justice (*Florence M. Peterson*) for defendant.

DICARLO, *Judge:* Defendant moves pursuant to Rule 12(e) of the Rules of this Court for an order requiring plaintiff to file an amended complaint. Plaintiff has not responded to the motion.

Rule 12(e) permits a party to "move for a more definite statement" if a pleading "is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading." Defendant contends that it cannot adequately respond to the complaint without knowing the classification which plaintiff claims is proper.

Defendant also says plaintiff has failed to set forth information requested in the Appendix to the Rules of this Court, which provides in part:

(c) Classification: If the contested customs decision involves the classification of merchandise, the complaint should also set forth:

* * * * * * *

(2) the tariff description and the paragraph or item number of the statute, including all modifications and amendments thereof, under which the merchandise is claimed to be properly subject to classification, and the rate of duty claimed to be applicable * * *.

In its complaint plaintiff alleges that:

(6) Said [closed-circuit television inspection system] components were imported on or about December 16, 1983, and were classified under Item 685.1060/5.1% Tariff Schedule of the United States (19 U.S.C. §1202). Subsequent to its importing, the components were reclassified as being dutiable under Item 712.0500/17.5% Tariff Schedule of the United States (hereinafter referred to as TSUS). Said reclassification resulted in an increase in duty, the responsibility for payment of which fell on the Plaintiff.

(7) Said reclassification was improper. The imported components do not comprise a complete commercial entity, but instead must be assembled with additional components to form a complete article of commerce.

* * * * * * *

(10) For the Second Count of its Complaint, the Plaintiff realleges and incorporates all of the allegations contained in Plaintiff's One through Nine of the First Count of its Complaint as if fully rewritten herein and goes on further to state that on June 23, 1983, the U.S. Customs Service issued a ruling letter (refer to CLA-2-06:S:C:D6:5=60-283 805843) wherein it was set out that if the Plaintiff were to import separate entities for its [merchandise] said entities would not be classified under Item 712.05/17.5%, TSUS, but would rather be classified under a completely different Item, at a much lower ad valorem rate.

(11) The Plaintiff has satisfied the conditions of the ruling letter in its transaction, and detrimentally relied on the statements contained within said ruling letter, when it imported the components at issue herein.

(12) Said components were imported on or about December 16, 1983, and were classified under Item 685.1060/5.1%, TSUS. Subsequent to the importing, they were reclassified as being dutiable under Item 712.0500/17.5%, TSUS, in direct contravention of the U.S. Customs Service ruling letter.

While using terminology not usually found in complaints challenging United States Customs Service classifications, plaintiff does allege that classification of the merchandise under item 712.05, Tariff Schedules of the United States (TSUS), is erroneous, and that the merchandise should be classified under item 685.10, TSUS. Therefore the Court need not and does not address whether relief

under Rule 12(e) is appropriate if a plaintiff does not allege in the complaint its proposed alternative classification. *Cf. Terumo Corp.* v. *United States,* 10 CIT ——, Slip Op. 85–86, at p. 4 (August 23, 1985); *Jarvis Clark Co.* v. *United States,* 733 F.2d 873, 878 (Fed. Cir. 1983), *reh'g denied,* 739 F.2d 628 (Fed. Cir. 1984).

The Court finds that the complaint is not so vague or ambiguous that defendant cannot reasonably be required to respond, and that the complaint is in compliance with the relevant parts of the Appendix to the Rules of the Court.

The motion is denied. So ordered.

(Slip Op. 86–51)

ALHAMBRA FOUNDRY, ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT AND SOUTH BAY FOUNDRY, ET AL., INTERVENORS

Court No. 83–4–00500

Before CARMAN, *Judge.*

MEMORANDUM OPINION

[Defendant's motion for vacatur of remand granted and judgment entered for Defendant sustaining the Department of Commerce's final affirmative countervailing duty determination and order.]

(Decided May 5, 1986)

Simonelli & Hall (*Michael H. Hall* on the motion) for the plaintiff.

Richard K. Willard, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch (*A. David Lafer* on the motion) for the defendant.

Brownstein, Zeidman & Schomer (*David Amerine* and *Irwin Altschuler* on the motion) for the intervenor.

After reviewing a final affirmative countervailing duty determination brought before this Court by plaintiff's motion under Rule 56.1 of the Court, the Court affirmed the determination of the United States Department of Commerce, International Trade Administration (ITA) regarding twelve of the challenges asserted by plaintiffs and remanded the case regarding the remaining three challenges. Defendant now moves for vacatur of that part of this Court's decision of December 30, 1985, remanding the case to the ITA. Plaintiffs oppose defendant's motion for vacatur of the remand, while intervenors have filed a memorandum supporting the motion.

In Slip Op. 85–130, the Court remanded the case for further clarification and determination regarding the following issues:

> (1) the calculation of FONEI (Fund for Industrial Development) and FOGAIN (Fund for the Guarantee of Medium and Small Industry) benefits;
>
> (2) the calculation of the benefit of the state tax exemption received; and

(3) the exchange rates used by the ITA in calculating the net benefit used.

Subsequent to the remand order, the ITA completed its first annual administrative review pursuant to 19 U.S.C. § 1675(a)(1982). As the results of this review will serve as the basis for the actual duty assessment on any unliquidated entries covered by the final determination, as well as for the cash deposits of estimated duties for future entries, defendant contends that the results of the remand would have no practical effect since they will never be used for duty assessment nor for deposits of estimated duties. In short, argues defendant, "there are no entries, present or prospective, which can be affected by any change that may be found upon remand." Defendant's Brief 3.

In *Silver Reed America, Inc.* v. *United States,* 9 CIT —, Slip Op. 85–51 (May 1, 1985), the Court was faced with an analogous situation in which it had remanded an antidumping determination for reconsideration of a level of trade adjustment. But as subsequently completed administrative reviews govern the rates of final duty assessment and future estimated duty deposits, the Court concluded that recalculation of the dumping margins in the final less than fair value determination would have no effect. The Court stated:

> Following an antidumping order, actual duty assessment is based upon an administrative review, either an "early determination" under 19 U.S.C. § 1673e(c) or periodic review determination pursuant to 19 U.S.C. § 1675(a). The results of such administrative reviews serve as the basis for actual duty assessments with regard to the entries covered by the particular determination and as the basis for cash deposits of estimated duties for future entries.

Id. at 6. Further, administrative review determinations are subject to judicial review under 19 U.S.C. § 1516(a)(2). The Court went on to hold, then, that "under the statutory framework here, judicial review must be based upon the administrative record of the particular proceeding resulting in the challenged determination." [1] *Id.* at 7.

Just as in *Silver Reed,* a remand in this action would serve no purpose. The Court in Slip Op. 85–130 sustained the ITA's determination regarding twelve of the fifteen challenges of plaintiffs. Reversal of the ITA on any of the remaining three issues could do no more than reflect an increase in the amount of net bounties or

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[1] With the Trade and Tariff Act of 1984, Pub. L. No. 98–573, § 611(a)(2)(A), 98 Stat. 3031, Congress inserted into the periodic review provision the condition that such a review be requested:

> At least once during each 12-month period beginning on the anniversary date of a countervailing duty order * * *, an antidumping duty order * * *, or the notice of the suspension of an investigation, the administering authority, *if a request for such a review has been received and* after publication of such a review * * *, shall—
>
> (A) review and determine the amount of any net subsidy,
>
> (B) review, and determine * * * the amount of any antidumping duty, and
>
> (C) review the current status of, and compliance with, any agreement by reason of which an investigation was suspended * * *.

19 U.S.C. § 1675(a)(1)(A)–(C) (1982 & Supp. II 1984) (emphasis added).

grants bestowed by the Mexican government (which increase may or may not be reflected in the record of the more recent administrative review). The ITA's affirmative final determination and order thus remains in full force and effect.

CONCLUSION

For the foregoing reasons, the Court grants defendant's motion for vacatur of that part of this Court's decision of December 30, 1985, in Slip Op. 85–130 which remanded the case to the ITA, and orders that final judgment be entered sustaining the validity of the final affirmative countervailing duty determination and order on iron-metal construction castings from Mexico.

(Slip Op. 86–52)

WEAR ME APPAREL CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 81–4–00448

Before DICARLO, *Judge.*

Defendant moves to dismiss action challenging exclusion of merchandise for lack of jurisdiction. Defendant argues that since plaintiff exported merchandise to a foreign trade zone, the Court no longer has jurisdiction over the action.

Held: The merchandise lost its status as excluded merchandise after it was released from Customs custody and exported to foreign trade zone. Since the merchandise covered by the protest was exported, the protest was abandoned and an action challenging the denial of the protest cannot be maintained.

[Defendant's motion is granted.]

(Decided May 12, 1986)

Grunfeld, Desiderio, Lebowitz & Silverman (*Michael P. Maxwell*) for plaintiff.

Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Civil Division, Department of Justice (*Florence M. Peterson*) for defendant.

MEMORANDUM OPINION AND ORDER

DICARLO, *Judge:* Defendant moves to dismiss this action challenging the exclusion of merchandise for lack of jurisdiction. The question presented is whether the Court has jurisdiction over a challenge to the exclusion of merchandise after the importer has removed the merchandise from the customs territory of the United States to a foreign trade zone. The Court holds that it does not have jurisdiction and grants defendant's motion to dismiss.

In December 1980 Customs refused to allow plaintiff to enter merchandise for consumption under plaintiff's visas and the merchandise was sent to a Customs bonded warehouse. In April 1981 plaintiff commenced an action pursuant to 28 U.S.C. § 1581(a) (1982) contesting the denial of its protest. Approximately one year later plaintiff filed its complaint demanding that the merchandise

be held classifiable under the quota categories for which it had obtained visas.

In February 1985 Customs gave notice that the merchandise which had been stored in the Customs bonded warehouse for more than five years would be sold at public auction. Customs action was taken in accordance with 19 C.F.R. §§ 127.14(a) and 144.5(a) (1985), which require that such merchandise be sold at public auction if not withdrawn within five years.

Plaintiff did not attempt to preserve jurisdiction by moving under the All Writs Act, 28 U.S.C. § 1651(a) (1982), for an injunction prohibiting public auction of the merchandise in the Customs bonded warehouse pending the Court's determination. *Cf. Alberta Gas Chemicals, Inc.* v. *United States,* 85 Cust. Ct. 122, C.R.D. 80-13, 496 F. Supp. 1332 (1980). Instead, plaintiff withdrew its merchandise for export by transferring the merchandise to a foreign trade zone as "zone-restricted merchandise." *See* 19 C.F.R. § 146.25 (1985).

Defendant specifically argues that the Court lacks jurisdiction because the action is moot. Plaintiff concedes that the action is moot with respect to two entries which were entered under visa waivers and liquidated. With respect to the merchandise in the foreign trade zone, plaintiff theorizes that if the Court were to enter an order ruling as to the proper classification of such merchandise for quota purposes, it would then seek a ruling by the Foreign Trade Zone Board that return of the zone-restricted merchandise to Customs territory for domestic consumption was in the public interest. Zone-restricted merchandise can be transferred from a foreign trade zone to the customs territory only when the Foreign Trade Zone Board rules that the public interest would be served by such a transfer. 19 U.S.C. § 81c (1982 & Supp. II 1984); 19 C.F.R. § 146.47 (1985).

In its complaint, plaintiff alleges jurisdiction under 28 U.S.C. §§ 1581(a) and 1581(i)(3)-(4). Generally section 1581(i) does not provide jurisdiction where an action is properly brought under another jurisdictional provision. *United States* v. *Uniroyal, Inc.,* 69 CCPA 179, 182-83, 687 F.2d 467, 471 (1982). Jurisdiction is exercised under section 1581(i) where "it would be inappropriate for the Court to require the exhaustion of administrative remedies" under section 1514(a). *United States Cane Sugar Refiners' Ass'n* v. *Block,* 3 CIT 196, 202, 544 F. Supp. 883, 887, *aff'd,* 69 CCPA 172, 683 F.2d 399 (1982); *see United States* v. *Uniroyal, Inc., supra.* Since the exhaustion of administrative remedies under section 1514(a) was appropriate in this case, the action was not properly brought under 28 U.S.C. § 1581(i).

Section 1581(a) is the proper jurisdictional provision for bringing this action to contest the denial of a protest under 19 U.S.C. § 1514(a)(4), which provides for review of Customs decisions relating to "the exclusion of merchandise from entry or delivery or a demand for redelivery to customs custody under any provision of

the customs laws * * *." The merchandise was excluded by Customs after Customs refused entry and while the merchandise remained in the Customs bonded warehouse.

Under the Foreign Trade Zone Act, 19 U.S.C. § 81a–u (1982 & Supp. II 1984), merchandise is deemed exported once it is transferred from customs territory to a foreign trade zone:

> [A]rticles which have been taken into a zone from customs territory for the sole purpose of exportation, * * * or storage shall be considered to be exported for the purpose of—
>
> (1) the draw-back, warehousing, and bonding, or any other provisions of the Tariff Act of 1930, as amended, and the regulations thereunder * * *.

19 U.S.C. § 81c(a). "For purposes of the entry of foreign merchandise * * * a foreign trade zone is not considered to be a part of the customs territory of the United States." *Hawaiian Independent Refinery* v. *United States*, 81 Cust. Ct. 117, 118, C.D. 4777, 460 F. Supp. 1249, 1251 (1978).

Under these circumstances the Court does not have jurisdiction under 28 U.S.C. § 1581(a). Plaintiff's protest and complaint challenge the exclusion of merchandise. The Court holds that the merchandise lost its status as excluded merchandise after it was released from Customs custody and exported to a foreign trade zone. When the merchandise was exported plaintiff's protest was abandoned and this action contesting the denial of the protest could no longer be maintained. *See Hooker Electrochemical Co.* v. *United States*, 16 Cust. Ct. 223 (1946). Since the Court lacks jurisdiction, the Court need not address plaintiff's argument that it would benefit from a determination as to the proper classification of plaintiff's merchandise for quota purposes.

Judgment will be entered accordingly. So ordered.

ABSTRACTED VALUAT

Decision number	Judge & date of decision	Plaintiff	Court No.	Basis of valuation	
V86/71	Watson, J. April 22, 1986	Dingelstedt & Co.	269291A, etc.	Export value	
V86/72	Watson, J. April 22, 1986	Eli E. Albert Inc.	R58/28503, etc.	Export value	
V86/73	Watson, J. April 22, 1986	Englishtown Corp.	R61/10132	Export value	
V86/74	Watson, J. April 22, 1986	Frank P. Dow Co.	R60/12057	Export value	
V86/75	Watson, J. April 22, 1986	Frank P. Dow Co.	R60/12168	Export value	
V86/76	Watson, J. April 22, 1986	G.C. Murphy Co.	R61/20069, etc.	Export value	
V86/77	Watson, J. April 22, 1986	George E. Bardwill & Sons	R58/11745, etc.	Export value	

LUATION DECISIONS

ion	Held value	Basis	Port of entry and merchandise
	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Silk and rayon scarves
	Appraised values less 7.5% thereof	Agreed statement of facts	New York Gloves
	Appraised values less 7.5% thereof	Agreed statement of facts	New York Stainless steel flatware
	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	Los Angeles Binoculars
	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	Los Angeles Binoculars
	Appraised values less 7.5% thereof	Agreed statement of facts	New York Gloves
	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Tablecloths and napkins

V86/78	Watson, J. April 22, 1986	Island Spun Inc.	R58/17262, etc.	Export value	F.o.b. plus betw and
V86/79	Watson, J. April 22, 1986	J.M. Rodgers Co.	271780A, etc.	Export value	F.o.b. plus betw and
V86/80	Watson, J. April 22, 1986	S.E. Lesslo	R59/8605, etc.	Export value	Appra ther
V86/81	Watson, J. April 22, 1986	S. Shamash & Sons, Inc.	R59/1131, etc.	Export value	F.o.b. plus betw and
V86/82	Watson, J. April 22, 1986	S. Shamash & Sons, Inc.	R59/4426, etc.	Export value	F.o.b. plus betw and
V86/83	Watson, J. April 22, 1986	S. Shamash & Sons, Inc.	R58/25143, etc.	Export value	F.o.b. plus betw voic prai
V86/84	Watson, J. April 22, 1986	Toyobo N.Y., Inc.	R59/11141	Export value	F.o.b. plus betw and
V86/85	Watson, J. April 22, 1986	W.J. Byrnes & Co.	R59/14889, etc.	Export value	F.o.b. plus betw and
V86/86	Watson, J. April 23, 1986	Salim S. Dweck	R61/8868, etc.	Export value	F.o.b. plus betw and

F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Ladies' wool sweaters
F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Cotton velveteen, etc.
Appraised values less 7.5% thereof	Agreed statement of facts	New York Binoculars
F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Silk fabrics
F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Silk fabrics
F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Silk fabrics
F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Cotton cloth
F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	Los Angeles Silk fabrics
F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Cotton bedspreads, etc.

ABSTRACTED VALUATION DECISION

Decision number	Judge & date of decision	Plaintiff	Court No.	Basis of valuation	Held
V86/87	Watson, J. April 23, 1986	Gimbel Bros. Inc.	272043A, etc.	Export value	F.o.b. unit plus 20% between f.o and appra
V86/88	Watson, J. April 23, 1986	Gosho Trading Co.	R58/14895, etc.	Export value	F.o.b. unit plus 20% between f.o and appra
V86/89	Watson, J. April 23, 1986	Gosho Trading Co.	R59/9689, etc.	Export value	F.o.b. unit pr of differe f.o.b. unit praised val
V86/90	Watson, J. April 23, 1986	S.E. Laszlo	281563A, etc.	Export value	F.o.b. unit plus 20% between f.o and appra
V86/91	Watson, J. April 23, 1986	Liberty Slax Inc.	R59/17951	Export value	Appraised va thereof
V86/92	Watson, J. April 23, 1986	Reliance Intercontinental Corp.	R58/7750, etc.	Export value	Appraised u 7.5% net p
V86/93	Watson, J. April 24, 1986	J.M. Rodgers Co.	R58/4827, etc.	Export value	Appraised va thereof
V86/94	Watson, J. April 24, 1986	Marshall Co.	279890A, etc.	Export value	F.o.b. invoic 20% of tween f.o.b prices a values, or Appraised u 7.5% there

ISIONS—Continued

Held value	Basis	Port of entry and merchandise
unit invoice prices 20% of difference ween f.o.b. unit prices appraised values	Agreed statement of facts	New York Silk and rayon scarves, etc.
unit invoice prices 20% of difference ween f.o.b. unit prices appraised values	Agreed statement of facts	New York Cotton grey broadcloth, etc.
unit prices plus 20% difference between . unit prices and ap-ised values	Agreed statement of facts	Los Angeles Transistor radios together with their accessories and parts; an entirety
unit invoice prices 20% of difference ween f.o.b. unit prices appraised values	Agreed statement of facts	New York Binoculars
ised values less 7.5% reof	Agreed statement of facts	New York Cotton trousers
ised unit values less % net pkd.	Agreed statement of facts	New York Gloves
ised values less 7.5% reof	Agreed statement of facts	New York Porcelain dinnerware
invoice prices plus of difference be-en f.o.b. unit invoice es and appraised es, or ised unit values less % thereof, net packed	Agreed statement of facts	Honolulu Binoculars

V86/95	Watson, J. May 8, 1986	Balfour, Guthrie & Co.	R62/1574, etc.	Export value	App on 7.
V86/96	Watson, J. May 8, 1986	Bunge Corp.	R60/17399, etc.	Export value	F.o.b pl be vo pr
V86/97	Watson, J. May 8, 1986	Continental Merchandise Co.	R62/4586, etc.	Export value	App en an vo ch pr
V86/98	Watson, J. May 8, 1986	Cornet Stores	R59/1792, etc.	Export value	App en 7.
V86/99	Watson, J. May 8, 1986	International Importers, Inc.	R60/12959, etc.	Export value	F.o.b of f.o pr
V86/100	Watson, J. May 8, 1986	Nichimen Co.	R63/3438, etc.	Export value	App 7.
V86/101	Watson, J. May 8, 1986	Nomura (America) Corp.	R65/2088	Export value	F.o.b of f.o pr
V86/102	Watson, J. May 8, 1986	Transcontinental Com. Co.	R62/135, etc.	Export value	App 7.
V86/103	Watson, J. May 8, 1986	Trans-Ocean Import Co.	R60/15931, etc.	Export value	F.o.b pl be vo pr

Appraised values as shown on entry documents, less 7.5% thereof, net packed	Agreed statement of facts	San Francisco Canned tuna
F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Tube mats
Appraised values shown on entry papers less amounts listed on invoices as "design charges" included in appraised values	Panation Trade Co. v. U.S., A.R.D. 181 (1965)	New York Cigarette lighters
Appraised values shown on entry documents, less 7.5% thereof net, packed	Agreed statement of facts	Los Angeles Rayon, silk
F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	Chicago and Honolulu Transistor radios together with their accessories and parts, an entirety
Appraised unit values less 7.5% thereof net, pkd.	Agreed statement of facts	Los Angeles Transistor radios together with their accessories and parts, an entirety
F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	Houston Transistor radios together with their accessories and parts, an entirety
Appraised unit values less 7.5% thereof, net pkd.	Agreed statement of facts	New York Transistor radios together with their accessories and parts, an entirety
F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Rugs

ABSTRACTED VALUATION DECISI

Decision number	Judge & date of decision	Plaintiff	Court No.	Basis of valuation	H
V86/104	Watson, J. May 8, 1986	William A. Rogers Inc.	R61/10149, etc.	Export value	Appraised 7.5% th
V86/105	DiCarlo, J. May 8, 1986	Mitsubishi International Corp.	82-5-00613	American selling price	Appraised per pair
V86/106	Rao, J. May 9, 1986	The Singer Co.	77-9-02856	Export value	Appraised entry p with t Singer Needle Appraised Model Needles
V86/107	Rao, J. May 9, 1986	The Singer Co.	79-10-01582	Export value	Appraised entry p
V86/108	Rao, J. May 9, 1986	The Singer Cjo.	79-12-01952	Export value	Appraised entry p
V86/109	Rao, J. May 9, 1986	The Singer Co.	81-5-00616	Export value	Appraised entry p
V86/110	Rao, J. May 9, 1986	The Singer Co.	82-1-00121	Export value	Appraised entry p

ECISIONS—Continued

Held value	Basis	Port of entry and merchandise
praised unit values less 7.5% thereof, net packed	Agreed statement of facts	Chicago Transistor radios together with their accessories and parts, an entirety
praised values less 22%, per pair	Agreed statement of facts	San Francisco Footwear
praised values shown on entry papers less 28.5% with the exception of Singer Model 2045 Needle praised values on Singer Model 2020 and 2021 Needles, less 28.5%	Hensel Bruckmann & Lorbacher, Inc. v. United States, 735 F.2d 1340 (1984)	Boston Industrial sewing needles
praised values shown on entry papers less 28.5%	Hensel Bruckmann & Lorbacher, Inc. v. U.S., 735 F.2d 1340 (1984)	Nashville Industrial sewing machine needles
praised values shown on entry papers less 28.5%	Hensel Bruckmann & Lorbacher, Inc. v. U.S., 735 F.2d 1340 (1984)	Boston Industrial sewing machine needles
praised values shown on entry papers less 28.5%	Hensel Bruckmann & Lorbacher, Inc. v. U.S., 735 F.2d 1340 (1984)	Boston Sewing machine needles
praised values shown on entry papers less 28.5%	Hensel Bruckmann & Lorbacher, Inc. v. U.S., 735 F.2d 1340 (1984)	Boston Sewing machine needles

NOTICE

The Procedural Handbook of the United States Court of International Trade, prepared by the staff of the Office of the Clerk, is now available. The Handbook provides basic information for the practitioner in processing actions under the court's Rules. It is intended to serve solely as a convenient guide and reference source, which consolidates and summarizes various procedures before the court.

The cost of the Handbook is $10.00. If you are interested in receiving a copy of the Handbook, please fill out the form below and return to:

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Appeal to the U.S. Court of Appeals for the Federal Circuit

ICC Industries, Inc. v. United States, 10 CIT —, Slip Op. 86-31 (March 19, 1986), *appeal docketed,* No. 86-1201 (Fed. Cir. April 27, 1986).

Index

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